

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF DEPARTMENT OF FISH, WILDLIFE AND PARKS
GRIEVANCE NO. 3-2005:

TERRY HILL,)	Case No. 1268-2005
)	
Grievant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
MONTANA DEPARTMENT OF)	
FISH, WILDLIFE AND PARKS,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

Terry Hill filed an employment grievance against Montana Fish, Wildlife and Parks (FWP), alleging that his reassignment from warden captain to field game warden was improper because the action was disciplinary in nature and he was not provided due process prior to the reassignment.

On August 26, 2005, Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter. William Bronson, attorney at law, represented Hill. John Lynch, attorney at Law, represented FWP. Hill, Jim Kropp, Mike Adderhold, and Julie Sanders testified under oath at the hearing. The parties stipulated to the admission of Hill's documents 2, 4, and 11 and FWP's documents A and C. The parties were given the opportunity to submit post-hearing briefs which they did on September 30, 2005. On that date, the matter was deemed submitted for decision. Based upon the evidence adduced at hearing and the arguments submitted in the post-hearing briefs, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

II. ISSUE

Was Hill aggrieved in a serious matter of his employment when he was reassigned from warden captain to field game warden?

III. FINDINGS OF FACT

1. FWP promoted Hill to the position of warden captain in 1994. As warden captain, Hill's position included supervising all other wardens in the Region 4 area. His position also involved developing policy and procedures for Region 4 wardens. In this position, Hill reported to Mike Adderhold, Region 4 supervisor.

2. Over the tenure of Hill's position as warden supervisor, some of his charges began to complain about Hill's perceived micro management of the wardens in Region 4. Eventually, personnel under Hill overtly criticized his management. Perhaps the most scathing was a complaint filed by Warden Golie, a Region 4 warden, wherein Golie complained of several instances of what Golie perceived as inappropriate and unprofessional conduct by Hill as warden captain.

3. FWP management became aware that the wardens in Region 4 were not happy with Hill's management. Management was genuinely and primarily concerned with the obvious deleterious effect that Hill's presence in the warden captain position was having upon the morale of other personnel in Region 4. Larry Peterman, Jim Kropp, and Adderhold met once in May 2004 and once in June 2004 to discuss changes in the warden captain position occupied by Hill. During these meetings, the participants discussed "real and perceived problems" with Hill in the position and ways to rectify the problem. Exhibit 2, Page 6.

4. On July 7, 2004, Adderhold met with Hill and advised him of the discussions that had been taking place regarding Hill continuing in the position of warden captain. They also discussed the personnel problems that had developed among Hill's charges as a result of Hill's holding the warden captain position. Adderhold advised Hill of Adderhold's meetings with Kropp and Peterman. He told Hill that there had been a management decision to remove Hill from the warden captain position. Adderhold also discussed with Hill the possibility of moving into another position with FWP such as moving to covert investigation, becoming involved with the statewide shooting sports, or becoming the statewide Fishing Access Site (FAS) coordinator.

5. Hill was taken aback by the discussion because he was unaware of both the discontent among his charges and their claims relating to his performance as the warden captain. He had not been offered the opportunity to rebut any of the allegations. Indeed, he was unaware to some extent of the specifics that led management to decide to remove him from the position of warden captain.

6. On July 21, 2004, Adderhold presented Hill with a performance appraisal quite unlike the performance appraisals he had previously received as warden captain.

Instead of the preprinted form which had previously been used (denominated as "Employee Performance Appraisal Form"), Adderhold prepared his own report using his own format. Hill did not receive annual performance evaluations as required by Admin. R. Mont. 2.21.6403.

7. In completing the appraisal, Adderhold solicited opinions from Region 4 program managers and wardens about Hill's strengths and weaknesses. Adderhold noted some strengths and several weaknesses. The appraisal memorialized Adderhold's May and June discussions with Peterman and Kropp and further noted the "possibility of applying Terry's considerable talents in another way." Exhibit 2, Page 6.

8. On July 22, 2004, Hill met with Adderhold, Peterman and Kropp to discuss Hill's continued assignment as warden captain in Region 4. At the meeting, Adderhold, Peterman and Kropp made it clear to Hill that he could no longer be the warden captain in Region 4 because of the morale problems engendered from Hill's holding the warden captain position. Adderhold, however, advised Hill that he could be transferred to a criminal investigation position, he could become the statewide FAS coordinator, or he could become the statewide shooting range coordinator.

9. On August 2, 2004, Adderhold and Hill had yet a third meeting. The meeting was held at Adderhold's request so that Adderhold could report to Peterman and Kropp about Hill's decision. Adderhold again told Hill that he could not remain as a warden captain. Adderhold further told Hill that if Hill had no interest in any of the three other positions that had been previously discussed, Hill would be reassigned to a field game warden position. Adderhold gave Hill permission to take administrative leave to consider whether he would take any of the three alternative positions.

10. After taking leave, Hill advised Adderhold that he could not take any of the three alternative positions that had been suggested. As a result, in November 2004, FWP reassigned Hill to the position of field game warden. Unlike the other game wardens, Hill does not report directly to a warden captain. Instead, he reports on a weekly basis to Kropp. There are no additional or extra duties imposed on Hill in his new field game warden position.

11. No reduction in pay or benefits befell Hill as a result of his reassignment to field game warden. His pay grade was apparently not changed. In fact, he is the highest paid warden among all wardens and warden captains in Montana. In addition, because he has been reassigned to the position of field game warden, he now gets premium overtime pay which he would not have received had he remained in the position of warden captain. However, Hill has encountered some difficulties in his

new position because of the chain of command he must now follow. As a result of earlier difficulties between himself and other Region 4 wardens, Hill is not allowed to have contact with certain other wardens in Region 4. This has resulted in such things as Hill not being permitted to enter the Region 4 office in Great Falls during normal working hours.

12. FWP did not consider Hill's reassignment to be a disciplinary action against Hill. As a result, management did not give him any opportunity to contest his reassignment. Nor was he given the opportunity to contest any of the complaints or criticisms that were factored into the decision to reassign Hill to the field game warden position.

IV. DISCUSSION AND ANALYSIS¹

The crux of this case lies not in any dispute of facts, but rather in whether or not the FWP's action in reassigning Hill to field game warden from warden captain amounts to formal disciplinary action against Hill. Hill contends that it does, arguing that the decision to reassign him to field game warden was based on complaints against him and that reassigning him to the position of field game warden was a demotion that adversely affected Hill. Hill then posits that because the action was essentially formal discipline, he was entitled to the full panoply of procedural safeguards that accompany formal discipline, none of which were accorded to him prior to his reassignment. FWP, on the other hand, contends that the decision was actually a management decision to "preserve the peace" among employees and was not directed at disciplining Hill. FWP agrees that none of the procedural requirements for formal discipline were followed before reassigning Hill, but asserts that none were necessary because (1) management was acting within management rights of public employees and (2) no disciplinary action was taken against Hill.

A FWP employee who has been aggrieved by implementation of formal discipline in his employment may grieve the action to the Board of Personnel Appeals. Mont. Code Ann. § 87-1-205. The burden is upon the employee to show that he has been aggrieved. A FWP employee who has been the subject of formal discipline can prove that he is aggrieved if the department has failed to follow the policies of the State of Montana on discipline handling. Those policies are set forth in Admin. R. Mont. 2.21.6506 - 2.21.6522.

Admin. R. Mont. 2.21.6506 provides in pertinent part:

¹Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

- (1) It is the policy of the state of Montana that:
- (a) state employees who fail to perform their jobs in a satisfactory manner or whose behavior otherwise interferes with or disrupts agency operations be subject to disciplinary action, up to and including discharge;
 - (b) disciplinary action be administered for just cause, as defined in this policy; and
 - (c) an employee be informed of the cause for disciplinary action and offered the opportunity to respond.

(2) It is the objective of this policy to establish procedures for taking formal disciplinary action.

Informal discipline is not part of the formal discipline process, is not accorded any of the protections afforded during formal discipline, and may not be grieved. Admin. R. Mont. 2.21.6508.

Admin. R. Mont. 2.21.6509(1) provides that “[f]ormal disciplinary actions include, but are not limited to, written warning, suspension without pay, disciplinary demotion, discharge or similar *disciplinary* action which adversely affects the employee.” (Emphasis added). Reading Admin. R. Mont. 2.21.6506, Admin. R. Mont. 2.21.6508, and Admin. R. Mont. 2.21.6509 (1) in conjunction leaves a distinct impression that whatever the action taken, it must be intended or have as its effect action which is disciplinary and which is tantamount to a written warning, suspension, disciplinary demotion or discharge.

Hill has cited *Neal v. Walters*, (5th Cir. 1984), 750 F. 2d 347, in support of his position that FWP’s action in this case was discipline. In that case, the Fifth Circuit Court of Appeals analyzed whether a Veteran’s Administration doctor’s position reassignment was improper because he had not received appropriate due process before the reassignment. The reassignment was to another position with like rank and status but with duties that did not demand as much of the doctor’s professional expertise. Under the applicable regulations, a doctor whose reassignment was undertaken as a result of conduct emanating from the doctor’s inaptitude or inefficiency was entitled to notice of the perceived deficiencies and a hearing before the reassignment could be made. The trial dismissed the doctor’s grievance, noting (1) that the applicable regulations did not require observance of the procedural safeguards imposed by the applicable regulations where the resultant discipline did not adversely affect the employee and (2) that in any event, the action against the doctor was not disciplinary action and therefore those regulations requiring certain due process protections in disciplinary actions did not apply. The court of appeals held that the trial court had erred in its first finding, but upheld the court’s

disposition nonetheless because the facts showed that indeed the proceeding against the doctor was not disciplinary.

Applying the rationale of the *Neal* case compels the hearing officer to conclude on the very unique facts of the case at bar that Hill's reassignment was not disciplinary in nature. The reassignment was not borne of punitive intent on the part of management. It was not carried with the purpose of correcting any of Hill's conduct. The purpose was to preserve employee morale and ensure continued smooth operation of Region 4. The lack of punitive intent is evident from the fact that no benefit or pay reduction was imposed on Hill. Moreover, Hill was given the privilege of choosing among several options for reassignment, options which would appear to have afforded Hill continued supervisory functions.² Under the facts of this case, it is evident that FWP's action was not intended to be disciplinary.

Moreover, the hearing officer cannot find that the reassignment was "formal" discipline of the type that would give rise to a grievance under the regulations. Hill does not contend that he received any type of suspension or written warning. Nor did he receive a "disciplinary demotion." The administrative rules define "disciplinary demotion" as "reclassification of an employee's position to a lower grade or the transfer of an employee to a position at a lower grade for just cause." Admin. R. Mont. 2.21.6507(10). In order to be considered a disciplinary demotion, an action demoting an individual must include a reduction in position duties corresponding with the new title and grade. *Id.* Hill has not produced any evidence in this case to show that his reassignment to field game warden resulted in reassignment of his position to a lower grade or his reassignment into a position at a lower grade. Indeed, his pay grade remained the same throughout the process and he is still the highest paid game warden in Montana, even among warden captains. Thus, by the terms of the applicable rules, Hill has not suffered a "disciplinary demotion."

Under either the regulations or case law, the hearing officer cannot find that FWP's action in this case amounted to discipline, much less formal discipline directed at Hill. Thus, Hill has failed to show that he has been aggrieved in a serious matter of his employment.

V. CONCLUSIONS OF LAW

² For example, the brief testimony at the hearing about the shooting coordinator position and the FAS coordinator position suggests that the positions may have involved some management and policy setting functions.

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 2-18-1011.

2. Hill has not been aggrieved by a serious matter of his employment due to his reassignment.

VI. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that Hill's grievance regarding his reassignment be denied.

DATED this 26th day of October, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.303(3)(c), the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than November 18, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518